

**Babcock & Wilcox Company and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC. Case 5-CA-12093**

August 13, 1981

**DECISION AND ORDER**

On April 7, 1981, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>3</sup>

**AMENDED CONCLUSIONS OF LAW**

Delete Conclusion of Law 3 and substitute the following:

"3. By requesting an employee to engage in surveillance of the union activity of other employees, Respondent violated Section 8(a)(1) of the Act."

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Babcock & Wilcox Company, Lynchburg, Virgin-

<sup>1</sup> Respondent has implicitly excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In fn. 9 of his Decision, the Administrative Law Judge found no legitimate motivating factor for Robert Hall's discharge. He therefore found he was not required to apply a *Wright Line* analysis. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). We agree that Respondent's motivation for discharging Hall was solely discriminatory. However, in agreeing with the Administrative Law Judge that a *Wright Line* analysis was not required, we do not rely on his related comments set forth in fn. 9. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

<sup>2</sup> The Administrative Law Judge's Conclusion of Law 3 failed to specify the exact nature of Respondent's 8(a)(1) violation. We will therefore modify Conclusion of Law 3 to reflect the Administrative Law Judge's finding.

<sup>3</sup> Par. 2(b) of the Administrative Law Judge's recommended Order is incomplete. In par. 2(d), the Administrative Law Judge mistakenly ordered Respondent to notify the Regional Director for Region 5 within 20 days from the receipt, rather than to notify him, in writing, within 20 days of the date of the Order, what steps Respondent has taken to comply herewith. We will modify the Administrative Law Judge's recommended Order accordingly.

Member Jenkins would compute interest on backpay owed to Robert Hall in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the following for paragraph 2(d):

"(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

3. Substitute the attached notice for that of the Administrative Law Judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

WE WILL NOT request employees to engage in surveillance of the union activities of other employees.

WE WILL NOT discharge or otherwise discriminate against any of our employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reinstate Robert Hall to his former job or, if that job no longer exists, to substantially equivalent employment without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of pay which he may have suffered as a result of our discrimination practiced against him, with interest.

**BABCOCK & WILCOX COMPANY**

**DECISION**

**STATEMENT OF THE CASE**

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed on April 8, 1980, by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, herein called the Union or Charging Party. A complaint thereon was issued on May 15, 1980. An amendment to the complaint issued on June 2, 1980. The amended complaint alleges that Babcock & Wilcox Company, herein

called Employer or Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by requesting an employee to engage in the surveillance of the union activities of another employee and violated Section 8(a)(3) of the Act by discharging Robert Hall because of his activities on behalf of the Union. Pursuant to notice a hearing was held before me on November 19 and 20, 1980. Briefs timely filed by the General Counsel, Respondent, and the Charging Party have been duly considered.<sup>1</sup>

## FINDINGS OF FACT<sup>2</sup>

### I. EMPLOYER

Respondent is engaged in the manufacture of nuclear fuel components at its Naval Nuclear Fuel Division plant at Mt. Athos, Campbell County, Virginia. During the past 12 months Employer purchased and received, in interstate commerce, materials valued in excess of \$50,000, directly from points outside the Commonwealth of Virginia. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION

The complaint alleges, Respondent in its answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The Facts

At the time of his discharge on March 24, 1980,<sup>3</sup> Hall had been employed by Respondent for about 10-1/2 years as an inspector in the quality control department. In 1974 and 1975 the United Steel Workers of America had attempted to organize Respondent's employees but lost representation elections in both years. Hall was active in both campaigns as a union organizer and wore buttons so designating him. He also distributed literature and solicited authorization cards. In the same fashion, Hall participated on behalf of the Union in the Union's effort to organize Respondent's employees, and was an observer for the Union at the Board-conducted election on April 5, 1979, which the Union lost.

A couple of weeks prior to his discharge, Hall heard a rumor that another organizational effort was to be under-

taken by the Teamsters Union and mentioned it to his immediate supervisor, Foreman James Martin, who asked him if the Teamsters would be distributing literature outside the plant. Hall replied that he did not know, but he hoped so. In early 1980, while Quality Control Inspector Frank Metz was working as acting foreman in place of Martin, the shift foreman, Paul Goff, pointed Hall out to Metz telling him to keep a close eye on Hall; that Hall drifted around the plant quite a lot; that he was known to be a "troublemaker," and was "heavily involved with the Union." Metz testified that Goff added that "if he had the opportunity he would like to get rid of him, that the company would be better off without him." Metz testified that Goff made such remarks on more than one occasion. While Goff denied making such remarks, I find his denials unconvincing and I credit Metz' testimony. The above facts, and the entire record, make it clear that the hierarchy of Respondent, including Ray Jesse, manager of the quality control department, and John L. Light, section manager for the dimensional inspection section of the quality control department, was aware that Hall was an active adherent, and such knowledge is essentially undisputed.

In the late morning on March 17, while inspecting a component, Hall observed a surface irregularity. Since Hall had reservations about the acceptability of the irregularity, he engaged quality control engineers Ray Gardner and Floyd Rice in a discussion about it. It appears that the difficulty arose from the fact that, while the irregularity had previously been detected and passed, there was no authority for Hall to rely on in making a decision himself to pass the defect. Normally there is a code specification which recognizes particular defects as acceptable, but in this case there was none. Hall's concern was for his responsibility in passing a defect as acceptable without some authority therefor. During this conversation, Rice left and returned with Foreman Marshall Cunningham.<sup>4</sup>

Cunningham appeared at the table where the component was resting and, upon observing the component, asked what the violation was, remarking that it did not violate a "damn thing." At this, Hall became irritated at what he perceived to be the "runaround" in getting anyone to define the irregularity as acceptable, which Hall felt was necessary for him to cover himself in the matter. Hall was not questioning the actual acceptability of the irregularity. In his frustration, Hall threw a small radius gauge down the length of the table in the direction of the wall some 20 feet away.<sup>5</sup> It hit the wall and fell to the floor. At the same time Hall was telling Cunningham that he was getting the runaround all morning

<sup>1</sup> No objection thereto having been filed, Respondent's motion to correct the transcript is hereby granted.

<sup>2</sup> There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition I have considered the inherent probabilities, the probabilities in light of other events, corroboration or the lack of it, and consistencies or inconsistencies within the testimony of each witness and between the testimony of each of that of other witnesses with similar apparent interests. In evaluating the testimony of witnesses I rely specifically upon his demeanor and have made my findings accordingly. While apart from considerations of demeanor I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed failure on my part to have fully considered it. *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

<sup>3</sup> All dates refer to 1980 unless otherwise indicated.

<sup>4</sup> There are two shifts which alternate along with a shift foreman every 2 weeks. These shift foremen are Lyle Steppe and Paul Goff. Steppe normally supervises Foremen Cunningham and James Martin. They, in turn, each supervise a group of some 15 inspectors, like Hall, who is normally supervised by Martin. However, on March 17, Hall switched with another employee and thus was under Foreman Cunningham's supervision. In addition, Steppe was absent and Goff had temporarily replaced him; thus Hall's immediate supervisor on March 17 was Cunningham and the shift foreman was Goff.

<sup>5</sup> This radius gauge is a L-shaped gauge about the width of a dime and about 1-1/2 inches long in each direction from the angle. (Resp. Exh. 2.)

and said, "Let's go see Ray," referring to Jesse, whereupon Hall left the table and started walking up the aisle. But upon observing that Cunningham was not coming, he returned to the table and resumed his discussion with the engineers and subsequently resolved the problem.

Cunningham testified that Hall "slung the gauge toward me." However, this testimony is not corroborated by the probative evidence. The testimony of Payton Cunningham, another quality control inspector, and Gardner convince me, particularly in view of the relative positions of Hall and Marshall Cunningham at the table, that Hall simply threw the gauge towards the wall in a gesture of frustration.

Shortly after the incident, Marshall Cunningham went to Goff's office and was told by Goff to write up the incident, which he did. Later in the afternoon about 2:30 p.m., both Cunningham and Goff went to see Light in his office. Goff explained that a "very serious incident" had occurred and Cunningham detailed his account of the above incident. Light, in view of what he described as the "extreme serious nature of the incident," contacted Rice and Gardner individually, but not Hall, who gave him whatever details they recalled. On the following morning, March 18, Light, without having spoken to Hall, went to see Jesse and gave Jesse the information he had received about the incident. Light testified, "In discussing the incident with Roy, I pointed out I felt that it was very serious, to me it was a case of insubordination, and my recommendation to Roy was, at that time, one, a minimum of 3 days without pay or possibly discharge." Light testified that his recommendation was based solely on the incident at the table, which he described as "insubordination," in challenging the authority of the foreman.

After speaking with Light, Jesse contacted Thomas V. D. Lee, manager of the employee and community relations department, who assigned his subordinate, George Thompson, to investigate the matter. Thompson obtained statements from several witnesses including Hall (G.C. Exhs. 3(a)-3(g)), and Hall was suspended pending an investigation. Thompson turned the statements over to Lee.

Jesse read the statements and testified that, based exclusively on their content, he recommended to Lee that Hall be discharged for violating work rule 20 (G.C. Exh. 4). On cross-examination Jesse changed his testimony to state that work rule 18 was more "appropriate."<sup>6</sup> Lee also read the statements and testified that, based solely on their content, decided that Hall be discharged.<sup>7</sup>

With respect to the actual termination, this was accomplished on March 24 by Light, upon instruction from Jesse. Light and Steppe met Hall at the gatehouse on

that date and Light read to him the following termination notice, previously written by Lee:

On March 17, 1980, T. M. Cunningham, foreman in QCDI, was asked by F. Rice, a QCDI engineer, to review a suspect quality condition being discussed by F. Rice, R. L. Gardner [Core Engineer] and R. W. Hall [QCDI inspector]. The core engineer [Gardner] had advised Hall that the suspect condition was not a violation. Cunningham reviewed the condition and asked Rice, "What does it violate?"

At this point, Hall became very angry, spun around toward Cunningham, and threw a radius gauge that he was holding in the direction of Cunningham. It missed Cunningham by a few inches, ricocheted off the component and flew approximately 20 feet into the wall. At the same time, Hall said, "I'm tired of getting the runaround, damn it, let's go see Roy" [apparently referring to Roy Jesse, Q. C. Department Manager]. He walked some distance down the main aisle then stopped and turned around and came back to the inspection table.

The disturbance created by Hall and the act of provocation directed at his supervisor [throwing the gauge and just missing Cunningham] cannot be tolerated. The unwarranted disrespect, insubordination and hostility directed toward Cunningham was a direct attack by Hall on the employee-supervisor relationship. The physical proximity of the thrown gauge to Cunningham, coupled with the anger and rage of Hall toward Cunningham, is undesirable fight provoking conduct. Based on his actions of March 17, 1980, Hall is hereby terminated.

Lee testified that the discharge of Hall was consistent with a prior incident in which a supervisor, upon being provoked by an employee, punched the employee and both were discharged, the supervisor for punching the employee, and the employee for the provocation. It is undisputed that the supervisor involved in that incident was fired on November 13, 1979, and that Lee told his personnel department to suggest to the supervisor that he apply at a commercial nuclear fuel plant, part of another division of Respondent, where the supervisor was hired on November 26, 1979, with no loss of accumulated pension credits.

The testimony of several quality control inspectors, including J. Robert Dudley, Payton Cunningham, Robert Trent, and Larry Woolsey, discloses that arguments between inspectors and foremen are not unusual, sometimes accompanied by profanity. Martin also testified that disagreements were not uncommon between quality control inspectors and foremen.

Metz testified about an incident sometime in late 1979 or early 1980 wherein Quality Control Inspector Kenneth Charleton got into a "shouting contest" with Cunningham over a correction in a package of data that Charleton was holding, whereupon Charleton slammed the data pack on Cunningham's desk. Robert Trent, a quality control inspector, testified about an incident

<sup>6</sup> Work rule 18 reads: "Fighting or provoking a fight or creating a disturbance on company property." Disciplinary action for violation of Rule 18 provides for immediate discharge. Work rule 20, under the heading of "Quality of Performance," reads: "Inefficiency, carelessness, negligence, and other undesirable performance will not be accepted. Disciplinary action including as appropriate, written reprimand, three-day suspension, or discharge—according to the severity of the violation—will result."

<sup>7</sup> It is undisputed that none of the supervisory hierarchy involved in Hall's discharge ever spoke to Hall about the matter. Their information concerning Hall's version of the incident came entirely from the statement taken from Hall.

during which Quality Control Inspector Randy Banks, when a 5-pound plastic block was thrown against the outside wall of the room he was in, threw the block in Cunningham's direction, landing at his feet. Both these incidents attracted the attention of nearby employees, but disciplinary action was not imposed in either case.

The record also discloses that, in addition to being an experienced employee, Hall was also a competent employee, highly regarded by his supervisor for the quality of his performance.

In this regard, Steppe testified that, during the week between the time of the incident on March 17 and Hall's discharge on March 24, he told Light that "he was a very capable individual, a very smart, knowledgeable person, knew his job," and that he was capable of "more than what he was doing." Hall's immediate supervisor, Martin, testified that Hall was a better than average employee, and that he had told Light that Hall was a good inspector and that he would hate to lose him. Lee concedes that when he made the decision to discharge Hall he was not familiar either with the quality of Hall's work or even his length of service.

#### B. Discussion and Analysis

The record establishes, beyond cavil, that Hall was an active union adherent not only in the most recent union campaign leading to the election on April 5, 1979, but also in two previous organizational efforts among Respondent's employees. He was an in-plant union organizer, had openly worn a union button so designating him, and had served as the union observer in the April 5, 1979 election. Nor can any serious doubt be entertained that Respondent was aware of Hall's role as a union activist. Goff's remark to Metz, in early 1980, to the effect that Hall was involved with the Union, as well as Hall's remarks to Martin some 2 weeks before his discharge indicating his approval of a prospective Teamsters organizational effort, all point up Respondent's awareness of Hall's pronoun sentiments and activities.

There remains the issue as to whether or not Hall was discharged for having engaged in such protected activity. I am satisfied that he was.

Hall was a long-term, 10-year employee with a good employment record. He was competent in the opinion of supervision beyond the work that he was performing. Martin testified that he did not want to lose him and so advised Light. Nonetheless, Hall was discharged and Martin was not even consulted on the matter.

In addition, this was a minor incident by any standard. It all took place in a matter of seconds when Hall, having been irritated by what he regarded as a "run-around," threw a very small object at a nearby wall. No reasonable person could have felt endangered by this gesture, nor could the act be properly construed as misconduct. The record makes it clear that disagreements between quality control inspectors and foremen are not uncommon. Indeed, given the nature of the work, and the responsibility assigned to quality control inspectors, differences of opinion, even heated discussions, would not be extraordinary, and the evidence supports this view. Indeed, more serious and disruptive infractions went undisciplined, for example, the throwing of a data

pack and a plastic block alluded to above. Both incidents involved Marshall Cunningham, the foreman involved in the incident herein. In the instant case, there appears to have been no disruption to or interference with the work of employees working at nearby tables.

Respondent contends that evenhanded justice mandated Hall's discharge since the supervisor-employee physical altercation prior to this, noted above, resulted in the discharge of both supervisor and employee. This analogy is inappropriate since in that case the supervisor did bodily harm to the employee by punching him; and also the supervisor was reemployed by Respondent in another division within 2 weeks.

More direct and convincing evidence of Respondent's antiunion motivation in discharging Hall appears in Metz' testimony, which I credit, to the effect that not only was Shift Foreman Goff generally antiunion himself, but he was aware that Hall was an active union adherent who should be watched because he wandered the plant and was heavily involved with unions. A review of the credited testimony discloses Goff's predisposition to fire Hall and also that Hall's pronoun posture was the source of Goff's irritation.<sup>8</sup>

In summary, it is my conclusion that Respondent violated Section 8(a)(1) of the Act by Goff's solicitation of Metz to survey Hall's union activity, and that Respondent also violated Section 8(a)(3) of the Act by discharging Hall.<sup>9</sup>

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of

<sup>8</sup> In agreement with the General Counsel, I conclude that Goff violated Sec. 8(a)(1) of the Act by directing Metz to survey the union activity of Hall. While it appears that these remarks were made at a time when Metz was filling in temporarily as a foreman in the place of Martin, it is undisputed that Metz was normally an employee. Indeed, it was stipulated at the hearing that Metz was not a supervisor within the meaning of the Act. The fact that Metz was an acting foreman when the remarks were made does not legitimize them since their coercive effect on Metz applied to, and was necessarily felt by him, in his primary status as an employee.

<sup>9</sup> Respondent's reliance on the *Mt. Healthy (Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 272 (1977)), test of causality, as set out by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is misplaced. I am satisfied that *Wright Line* applies to dual motive cases where one factor in the employer's motivation is legitimate. I am satisfied that this record discloses no legitimate motivating factor for Hall's discharge. In other words, this is not a dual motive case, it is a single motive case, and that motive was discriminatory within the meaning of Sec. 8(a)(3) of the Act.

the Act. I have found that Respondent discharged Robert Hall for reasons which offended the provisions of Section 8(a)(3) of the Act. I shall therefore recommend that Respondent make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him. The backpay is to be provided with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>10</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. By unlawfully discharging Robert Hall, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act as amended, I hereby issue the following recommended:

#### ORDER<sup>11</sup>

The Respondent, Babcock & Wilcox Company, Lynchburg, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requesting employees to engage in surveillance of the union activity of other employees.

(b) Discharging or otherwise discriminating against any employee for engaging in union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer to Robert Hall immediate and full reinstatement to his former job or, if it no longer exists, to substantially equivalent employment without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Naval Nuclear Fuel Division plant at Mt. Athos, Campbell County, Virginia, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, within 20 days from the date of this Decision, what steps have been taken to comply herewith.

<sup>10</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>11</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>12</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."